

HONORABLE LONNIE R. SUKO

Brian A. Christensen
Jerry J. Moberg & Associates
451 Diamond Drive
Ephrata, WA 98823
(509) 754-2356
Attorney for Defendants

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

DAVID A DODD

NO. CV - 12-522-LRS

Plaintiff(s),

DEFENDANT'S REPLY TO
PLAINTIFF'S OPPOSITION TO
SUMMARY JUDGMENT MOTION

v.

JAMES W. MARSHALL AND CITY
OF EAST WENATCHEE, sued in
individual and official capacities

Defendant(s).

Comes now the City of East Wenatchee and James W. Marshall, by
and through their attorney of record, Brian A. Christensen, and makes the
following Reply to Plaintiff's opposition to Defendants Motion for Summary
Judgment:

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Defendant's Reply to Plaintiff's
Opposition to Summary Judgment
Motion

Page -- 1

Jerry J. Moberg & Associates
Attorneys At Law
451 Diamond Drive
Ephrata, WA 98823
(509) 754-2356 / Fax (509) 754-4202

1 In response to Defendant's motion for summary judgment, the plaintiff
2 has merely filed a decision of a municipal court judge finding a lack of
3 probable cause for the arrest of Mr. Dodd by Officer Marshall. This
4 response fails to account for many of the plaintiff's claims and fails to
5 recognize the differences in the immunity and probable cause issues.
6

7 1. The issues of probable cause and qualified immunity are separate.

8 Even if it is determined that an arrest was made without probable cause, an
9 officer may still be entitled to qualified immunity. *Rosenbaum v. Washoe*
10 *County*, 663 F.3d 1071, 1078 (9th Cir. 2011). The qualified immunity test
11 gives deference to the judgment of reasonable officers on the scene.
12 *Saucier v. Katz*, 533 U.S. 194, 204 (2001). The linchpin of the qualified
13 immunity analysis is the reasonableness of the officer's conduct in the
14 particular case at hand. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).
15 One way of asking the reasonableness question in determining whether
16 qualified immunity applies is to ask "whether all reasonable officers would
17 agree that there was no probable cause in this instance." *Washoe County*,
18 663 F.3d at 1078. Plaintiff has not offered evidence to dispute this or even
19 discuss the issue. Further, plaintiff bears the burden of proving that the
20 particular federal right alleged to have been violated was so clearly
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1 established at the time of the official's action that the official should have
2 known that they were violating a constitutional right. *Robinson v. Seattle*,
3 119 Wash. 2d 34, 65-66, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992);
4 *Altshuler v. City of Seattle, Mun. Corp.*, 63 Wash. App. 389, 394, 819 P.2d
5 393 (1991). This issue was not discussed by Plaintiff.
6

7 Plaintiff has not proffered evidence to dispute the qualified immunity
8 analysis or the testimony of Mr. Ovens, the police practices expert. Officer
9 Marshall acted reasonably.

10 2. Plaintiff has not discussed the issues concerning most of the
11 claims. There was no discussion of excessive force, due process, freedom
12 of speech, or the state law claims. As no defense has been offered, they
13 should be dismissed. Further, there has been no discussion of the factors
14 involved with municipal liability or res judicata or collateral estoppel, if such
15 was being alleged by the plaintiff.
16

17 3. Plaintiff's response fails to follow the rules concerning factual
18 allegations and objections to factual allegations. LR 56.1 (b) states that a
19 party opposing a summary judgment motion must file with its responsive
20 memorandum a statement, in serial fashion, setting forth the specific facts
21 the party asserts create a genuine issue of fact. Also, it must specifically
22
23

1 identify any facts asserted by the moving party which the party disputes.

2 This rule was not followed.

3 The Defendant's ask the court to find as a matter of law that its
4 asserted facts are true, since they have not been specifically denied.
5

6 Plaintiff has failed to properly deny allegations or discuss issues
7 raised. The court should grant the motion for summary judgment.

8 SUBMITTED ON August 29, 2013.

9
10 s/ Brian A. Christensen
11 BRIAN A. CHRISTENSEN, WSBA #24682
12 Attorney for Defendants
13 Jerry J. Moberg & Associates
14 451 Diamond Drive
15 Ephrata, WA 98823
16 (509)754-2356
17 bchristensen@canfieldsolutions.com
18
19
20
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22
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

James Kirkham
james@kirkhamlaw.com

DATED August 30th, 2013 at Ephrata, Washington.

s/Brian A. Christensen
Brian A. Christensen